STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

Court of Appeals No. 347729

Lower Court No. 10-6891-01 FC

-vs-

RODERICK LOUIS PIPPEN
Defendant-Appellant
_____/

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

KATHERINE L. MARCUZ (P76625)
Attorney for Defendant-Appellant

APPLICATION FOR LEAVE TO APPEAL

STATE APPELLATE DEFENDER OFFICE

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Judgment Appealed From and Relief Sought

In a unanimous order, this Court held that Roderick's Pippen's trial attorney performed deficiently when he failed to investigate a critical witness, and it remanded the case to the trial court for a determination on prejudice. *People v Pippen*, 501 Mich 902 (2017), attached as Appendix C. Thereafter, the trial court erroneously found that Mr. Pippen had not met his burden under *Strickland* and the Court of Appeals affirmed. *People v Pippen*, per curiam unpublished opinion of the Court of Appeals, issued April 30, 2020 (Docket No. 347729), attached as Appendix E. Mr. Pippen again seeks this Court's review.

This appeal stems from a jury trial held in March of 2014 in the Wayne County Circuit Court. Roderick Pippen was convicted of felony murder, felon in possession of a firearm, and felony firearm, and sentenced to life without parole. The charges arose from the murder of Brandon Sheffield on July 21, 2008, during what appeared to be an attempted car-jacking. Mr. Pippen maintains his innocence.

The prosecution's case centered on the dubious testimony of Sean McDuffie, who claimed to be a witness to the crime, and who was absolved of his own legal troubles in exchange for his cooperation. At trial, McDuffie testified that in the summer of 2008 he was riding in a car with Mr. Pippen and their friend Michael Hudson when Mr. Pippen asked Mr. Hudson to stop the car. T4, 34.[1] According to McDuffie, Mr. Pippen got out, walked over to a parked truck, and shot the driver without warning. T4, 34-35, 41. McDuffie maintained that he did not know what motivated the shooting and that neither he nor Mr. Hudson knew that it was

[1] References to the trial transcript are denoted by "T" followed by the volume and page number. Likewise, references to the evidentiary hearing held on 2/23/15, 2/24/15, and 4/16/15 are denoted by "EH" followed by the volume and page number.

going to happen. T4, 58-59. The jury was told repeatedly that Mr. Hudson witnessed Mr. Pippen commit this crime, T2, 25, 27, 29, 35, but they never heard from Mr. Hudson.

In 2015, an evidentiary hearing was held pursuant to Mr. Pippen's motion for new trial. The sole issue before the court was whether Mr. Pippen's trial counsel was constitutionally ineffective in failing to investigate and present the testimony of Michael Hudson. At the hearing, trial counsel acknowledged that he knew about Mr. Hudson and that Mr. Hudson was readily available, but stated he never spoke to him prior to trial as he "had no intention of calling him as a witness." EH, 11-12. The trial court also heard from Michael Hudson who testified that McDuffie's trial testimony was not true. EH, 31. Mr. Hudson was never driving in a car with Mr. Pippen and Mr. McDuffie when Mr. Pippen got out of the car and shot someone. Mr. Hudson has never seen Mr. Pippen shoot anyone, ever. EH, 31. Prior to trial, when Mr. Hudson learned about what McDuffie told the police, he informed multiple people that McDuffie was lying, including a private investigator hired by the Pippen family. EH, 32.

The trial court denied the motion for new trial finding that trial counsel's performance did not fall below an objective standard of reasonableness, EH3, 1-8, and the Court of Appeals affirmed. *People v Pippen*, unpublished opinion per curiam of the Court of Appeals, decided January 14, 2016 (Docket No. 321487), attached as Appendix A.

Following supplemental briefing and oral argument, this Court found that Mr. Hudson's statements were exculpatory and held that trial counsel's failure to investigate was objectively unreasonable. Appendix C. It remanded the case to the Wayne County Circuit Court for a determination on prejudice. Appendix C.

Eleven months after hearing argument on remand, the trial court again denied the motion for new trial in a brief opinion that cited neither case law nor the record. It found that a

reasonable jury would not credit Mr. Hudson's testimony, and, given the totality of the evidence presented, there was not a reasonable probability the outcome of the trial would be different. *Trial Court Opinion & Order Denying Motion for New Trial* (attached as Appendix D) at 4-6.

The trial court abused its discretion on both points. First, in assessing credibility, the trial court only considered factors that it found tended to diminish the veracity of Mr. Hudson's testimony and ignored those that bolstered it. In doing so, it over-stepped its gatekeeping role and concluded that no reasonable juror could find Mr. Hudson's testimony credible. When considering Mr. Hudson's testimony in its entirety, it is clear it was not wholly incredible, as the trial court found. Second, despite giving lip service to this Court's order that it consider the totality of the evidence presented, the trial court failed to engage in a proper holistic review; it considered only the inculpatory evidence presented at trial and ignored the serious problems with McDuffie's credibility and the prosecution's case.

These errors were replicated by the Court of Appeals, which again affirmed the trial court in a per curiam unpublished opinion. Appendix E. Further, in response to Mr. Pippen's assertion that the trial court overstepped the limitations on its ability to make credibility determinations in determining the propriety of granting a new trial, the Court of Appeals summarily held that this Court's decision in *People v Johnson/Scott*, 502 Mich 541 (2018) is not applicable outside the context of newly-discovered evidence claims. Appendix E at 5-6. The Court of Appeals was wrong, and its analysis of this important legal question was done in one sentence: "*Johnson*, however, is not applicable here, as it is a case addressing review of newly-discovered evidence that would be presented on retrial." Appendix E at 6.

Mr. Pippen's appeal presents an opportunity to clarify the role of the trial court in making credibility determinations when assessing prejudice in the ineffective assistance of counsel

context. The law in this area is unclear and clarification is necessary to provide guidance to lower courts. Though *Johnson/Scott* directly concerned the trial court's role when rendering credibility determinations in assessing a newly discovered evidence claim, this Court looked to other contexts where the trial court's function is similarly limited because it is not the ultimate fact-finder. 502 Mich at 567-568, citing *People v Anderson*, 501 Mich 175 (2018).[2] It was this very consideration that led the Court to conclude that a trial court oversteps its gatekeeping role when it (1) fails to consider the reliable aspects of a witness' testimony in assessing credibility and (2) rejects as wholly incredible a witness who a reasonable juror may find worthy of belief on retrial. *Id*. at 570-571.

Claims of ineffective assistance of counsel are constitutional claims guaranteed by the Sixth Amendment to the United States Constitution and apply the same prejudice standard (reasonable probability of a different outcome) as newly discovered evidence claims. Similarly, when successful, ineffective assistance of counsel claims likewise result in "*retrial*, not dismissal." *Johnson/Scott*, 502 Mich at 567 (emphasis in original). For all these reasons, Mr. Pippen asserts that the limitations on the trial court's ability to assess credibility expressed in *Johnson/Scott* apply equally to questions of prejudice in the ineffective assistance of counsel context.

This Court should grant leave in order to clarify whether the rule expressed in *Johnson/Scott* applies equally to ineffective assistance of counsel claims, or peremptorily reverse and remand for a new trial. Even if this Court is not inclined to address the broader applicability of *Johnson/Scott*, Mr. Pippen is nonetheless entitled to a new trial because the trial court and

[2] *Johnson/Scott*, 502 Mich 541, 568 (2018) ("Although *Anderson* does not control in this context, as we are not now dealing with a preliminary examination, a trial court similarly plays a preliminary gatekeeping role in assessing a defendant's motion for relief from judgment; in both situations, the trial court is contemplating a future trial and the role of a future fact-finder.").

Court of Appeals failed to properly assess the effect of Mr. Hudson's testimony in light of the totality of the evidence, as required by *Strickland* and this Court's remand order. What's more, the Court of Appeals engaged in a palpably outcome-driven prejudice analysis that incorrectly characterized Mr. Hudson's testimony as immaterial, incredible, and unnecessary in order to conclude it would have had little effect. The decision of the Court of Appeals is clearly erroneous and will cause manifest injustice to Mr. Pippen, the appeal concerns legal principles of major importance to the state's jurisprudence, and the opinion conflicts with decisions of this Court, including *People v Johnson/Scott*, 502 Mich 541 (2018) and *People v Armstrong*, 490 Mich 281, 292 (2011). MCR 7.305(B).

A full evaluation of the record of this case makes clear that Mr. Pippen has made the showing required to obtain a new trial under the *Strickland* standard. Even if a jury might have some questions about Mr. Hudson's testimony, it would consider those questions not in a vacuum, but in conjunction with the obvious credibility issues present in the prosecution's own case. There is more than a reasonable probability that such balancing of the evidence would favor Mr. Pippen.

Statement of Question Presented

I. The trial court abused its discretion in finding that trial counsel's failure to investigate and present an exculpatory res gestae witness did not prejudice Mr. Pippen. Mr. Pippen made the necessary showing under the *Strickland* standard and is entitled to a new trial.

Court of Appeals answers, "No."

Roderick Louis Pippen answers, "Yes."

Statement of Facts and Material Proceedings

Pre-trial Proceedings

Mr. Pippen was bound over as charged and arraigned on the information in the Wayne County Circuit Court before the Honorable Deborah Thomas. Judge Thomas later granted Mr. Pippen's Motion to Quash, finding that there were so many inconsistencies between the surviving victim and McDuffie's accounts of the incident that one could not reasonably conclude they witnessed the same shooting and, absent any other evidence that Mr. Pippen was involved, probable cause was not established. See Motion Tr. 9/1/10 at 8-10. This Court reversed the trial court's order and remanded for further proceedings. *People v Pippen*, unpublished per curiam opinion of the Court of Appeals, issued December 13, 2011 (Docket No. 300171).

Pertinent Trial Evidence

The Crime

In the early morning hours of July 21, 2008, Brandon Sheffield was parked outside a friend's home on the east side of Detroit. He and three friends—Adam McGrier, Camry Larry, and Kyra Gregory—were seated in his Mercury Mountaineer, talking and watching rap videos on a laptop computer. T3, 48-49. Ms. Larry was initially standing outside the Mountaineer and leaning in the open driver's side window, when a car passed by that caught her attention. T3, 49, 51. She observed four individuals in the car and noted that the man in the front passenger seat was leaning out the window with his face covered from the nose down. T3, 52. Ms. Larry then got inside the Mountaineer and the friends continued watching the video. T3, 53.

About five minutes later a man approached the driver's side window. T3, 53. He had a "white thing" over his face, put a gun to Mr. Sheffield's head, and said "everybody get the fuck out the car." T3, 53-54. Ms. Larry described the man as tall, thin, and black, but could not say anything else about his appearance or the weapon. T3, 54-55, 60-62.

As Ms. Larry was attempting to get out of the car, she heard a shot. T3, 62-63. The car moved a few feet while she was still halfway inside; when it hit a tree and came to a stop, she saw that Mr. Sheffield had been shot and she ran to safety. T3, 56, 65-66.

Ms. Gregory and Mr. McGrier also testified. T3, 74-89 (Gregory); T3, 90-108 (McGrier). Ms. Gregory did not remember seeing a suspicious car before the shooting and she was unable to describe the shooter other than to say that he was a male. T3, 83-85. When asked if the man was tall, she replied, "no." T3, 78. Mr. McGrier, who was in the passenger seat at the time of the shooting, remembered a car pulling up alongside of them with four individuals inside, all of whom were wearing all black including black masks or scarves. T3, 101.

All four of the people in the shooter's car had weapons. T3, 102. McGrier testified that the individual in the front passenger seat exited the car and approached Mr. Sheffield with a black "normal size" handgun. T3, 96. He described the man as approximately six feet tall with a thin build and wearing a black "mask hat." T3, 94, 105. When interviewed by police after the incident he told them that the man had a dark complexion. T3, 106. At trial he testified that he was unable to see the shooter's face thus could not comment on his race or complexion. T3, 94.

Ballistic Evidence

Three months later, on October 18, 2008, Sergeant Eric Bucy was patrolling the area near Seven Mile and Fairport Road with three partners in a semi-marked police car when he saw Mr. Pippen standing with two other men, Michael Hudson and Norman Clark. T4, 11-12. Sergeant Bucy testified that when Mr. Pippen saw him, he started walking east and the Sergeant was able to notice the butt of a handgun protruding from his waistband. T4, 13. Bucy then testified that he got out of his car and followed Mr. Pippen as he and Hudson stepped between two parked cars. T4, 14.

While between the cars, Bucy saw Mr. Pippen take a handgun with a large magazine from his waistband and kick it under the car. T4, 14. He also witnessed Hudson drop and kick a different handgun, "a 38." T4, 14. Thereafter, Mr. Pippen and Mr. Hudson split ways. T4, 14.

Police apprehended Pippen, Hudson, and Clark, and recovered two handguns from under the car, a black Glock nine-millimeter with an extended magazine and a Bersa Thunder 380. T4, 14-15. Mr. Pippen was taken into custody. T4, 17. Mr. Hudson was also arrested. Mr. Clark was released without charges. T4, 17.

The parties stipulated that on January 27, 2009, Mr. Pippen admitted under oath to the Honorable Daniel Ryan that he was in possession of a firearm on October 18, 2008, in the area of Fairport and East Seven Mile Road in Detroit. T1, 4.

Former Detective-Sergeant Ronald Ainslie was qualified as an expert witness in the field of firearms and toolmark identification. T3, 6. Ainslie testified that in 2009, he examined a nine-millimeter Luger shell casing recovered from the inside of Mr. Sheffield's Mercury Mountaineer and then entered that shell casing into the Integrated Ballistics Identification System ("IBIS"). T3, 6-7. He also test-fired the nine-millimeter Glock semiautomatic pistol obtained during the arrest of Mr. Pippen on October 18, 2008 and collected a shell casing. T3, 9-10. He then compared that casing to the Luger casing and determined that the two casings were fired from the same gun. T3, 10.

The Testimony of Sean McDuffie

Sean McDuffie was friends with Mr. Pippen, Michael Hudson, and Norman Clark. T4, 31-32. He testified at trial that on August 25, 2009, Officer Mullins of the Detroit Police Department showed up at his home and wanted to talk to him. T4, 33-34, 53. At that time McDuffie was on Holmes Youthful Trainee Act ("HYTA") status for carrying a concealed

weapon and there was an open warrant out for his arrest for violation of HYTA. T3, 53-54. The police took him to the Homicide Department and asked him questions regarding "a whole bunch of shootings" and showed him pictures of homicide scenes. T4, 55-56. McDuffie also testified that the police showed him a sketch of a person and asked him "which one of [his] friends did it look like." T4, 66.

At some point during this interview, McDuffie told police that one night in the summer of 2008 he was riding around in a car with Michael Hudson and Roderick Pippen—Hudson was driving, and Mr. Pippen was in the front passenger seat. T4, 34. No one in the car was wearing masks or hoods at any point. T4, 42, 57-58. McDuffie testified that Mr. Pippen said that he saw someone he knew and asked Hudson to stop the car. T4, 34. According to McDuffie, Mr. Pippen then got out, walked over to the driver of a truck as if he was going to talk to him, and then shot him. T4, 34-35, 41. He saw people run and estimated there were a total of four people in the truck. T4, 39-40. McDuffie testified that Mr. Pippen got back in the car Hudson was driving and they drove to Hudson's cousin's house on Whitehill Street. T4, 35. He explained that he had no idea what the shooting was about and that neither he nor Hudson knew that it was going to happen. T4, 58-59.

McDuffie could not remember the type of car that Mr. Hudson was allegedly driving that evening or whose car it was. T4, 37. Nor could he remember exactly where or when this event happened but stated that he believed it was near Morang Avenue and Kelly Street or Houston Whittier Avenue and that it was sometime after 10:00 p.m., sometime during the summer of 2008. T4, 39, 42. When asked whether the victim's car rolled after the shooting or if it crashed into a tree, McDuffie testified that it did not. T4, 61, 66.

McDuffie further testified that Mr. Pippen used a "Glock nine," but that it was not his gun and the gun belonged to someone named Darnell "Terry" Hicks who is now dead. T4, 37. When asked on cross-examination about his testimony at the preliminary examination that the gun belonged to Norman Clark, McDuffie responded that Norman bought the gun from Terry. T4, 65.

McDuffie was brought to Mr. Pippen's trial on a material witness warrant. T4, 30. On direct examination he first testified that he did not witness Mr. Pippen shoot anyone. T4, 33. The prosecution then sought to treat him as an adverse witness, and it was only after being shown his statement to police that McDuffie adopted the statements he had previously made under oath inculpating Mr. Pippen. T4, 33-35. In exchange for his agreement to testify against Mr. Pippen, McDuffie was released from HYTA probation. T4, 31. In McDuffie's words, they "cancelled" his CCW case. T4, 59.

Post-conviction Proceedings

Evidentiary Hearing

Mr. Pippen filed a timely Motion for New Trial on the basis that trial counsel was ineffective for failing to investigate and present the testimony of Michael Hudson. A *Ginther*[3] hearing was held on February 23 and 24, 2015.

Attorney Luther Glenn was appointed to represent Mr. Pippen in this matter after the Court of Appeals reversed the circuit court's order granting Mr. Pippen's motion to quash the information and dismiss the charges. EH, 8. Mr. Glenn recalled that the prosecution's case against Mr. Pippen was circumstantial and that it "completely had to do with the credibility of [Sean McDuffie]." EH, 9. Mr. Glenn opined that McDuffie's testimony was the only testimony

[3] *People v Ginther*, 390 Mich 436 (1973).

that pointed to Mr. Pippen, it was "dubious at best," and that he had "strong issues with McDuffie's credibility." EH, 9. His trial strategy for attacking McDuffie's credibility was to expose McDuffie's motivation for providing the police with information, which Mr. Glenn believed extended beyond the deal he received in exchange for his testimony. EH, 10-11.

Mr. Glenn prepared for trial by reading the police reports, the preliminary exam transcript, and the sworn testimony of McDuffie pursuant to an investigate subpoena. EH, 11. He was aware that McDuffie claimed that Hudson was a witness to the shooting, and that Hudson had spoken to a private investigator hired by the Pippen family, but he did not contact or interview Hudson prior to trial. EH, 11-12.

Miguel Bruce is an experienced private investigator who was hired by the Pippen family prior to trial. EH, 18-20. Before opening his own private investigation company in or around 2005, Mr. Bruce was an officer in the Detroit Police Department for ten years where he worked in patrol, homicide, and the non-fatal shooting team. EH, 19.

Mr. Bruce met with Mr. Pippen's father and sister, who provided him information about the case. EH, 20. He reviewed Mr. Pippen's discovery materials, the preliminary exam transcript, and McDuffie's investigative subpoena testimony. Bruce familiarized himself with the facts of the crime, the prosecution's theory of the case, and McDuffie's version of events. EH, 20.

Mr. Bruce interviewed Michael Hudson prior to trial. EH, 22. When Mr. Bruce asked Hudson about McDuffie's story, Hudson told him that McDuffie was lying and that, "[i]t did not happen. He was not the driver. He was not involved with it." EH, 22. Mr. Bruce found Michael Hudson to be believable. EH, 23.

Mr. Bruce testified that Mr. Hudson was willing to be a witness for Mr. Pippen. EH, 23. He relayed this information to trial counsel. EH, 24. Based on his conversations with Mr. Glenn,

it was his impression that Mr. Glenn was going to contact Hudson. EH, 25.

In October 2008, Michael Hudson, a longtime friend of Mr. Pippen, was arrested with him on Seven Mile in Detroit. EH, 30. Hudson testified that they had just left the house and were walking to the gas station across the street when the police pulled up. EH, 35.

The police got out of the car and said, "come here." EH, 35. Mr. Hudson kept walking across the street and dropped a .38 handgun underneath a car. EH, 35. EH, 35, 37. He was charged with carrying a concealed weapon and pled guilty.[4] EH, 30. Mr. Hudson did not see Mr. Pippen throw a gun underneath the car but is aware that Pippen also faced gun charges as a result of that arrest and that he pled guilty as well. EH, 30, 35, 37.

Mr. Hudson has seen Mr. Pippen carry a gun before. EH, 37. Mr. Hudson carried a gun for protection and believed that Mr. Pippen also carried a gun for protection. EH, 38. Upon further questioning, Mr. Hudson explained that there is "a lot going on" in the neighborhood where they are from and that people carry guns to protect themselves and their family. EH, 38.

At some point after October 2008, Mr. Hudson learned that Mr. Pippen had been arrested and charged with a homicide. EH, 30. He also found out that Sean McDuffie had told police that he saw Mr. Pippen commit the crime. EH, 31. Additionally, Mr. Hudson learned that McDuffie told police that the night this crime occurred he [Hudson] was driving the car and that he also witnessed the shooting. EH, 31. Mr. Hudson testified that none of this is true. EH, 31. He was never driving in a car with Mr. Pippen and Mr. McDuffie when Mr. Pippen got out of the car and shot someone. EH, 31. Mr. Hudson has never seen Mr. Pippen shoot anyone, ever. EH, 31.

[4] Mr. Hudson has a prior criminal history. EH, 30. He acknowledged pleading guilty to three counts of larceny of a motor vehicle in 2005, one count of receiving and concealing stolen property motor vehicle in 2004, and one count of receiving and concealing stolen property motor vehicle in 2003. EH, 32-33.

Hudson informed multiple people that McDuffie was lying. EH, 32. He told the private investigator when they spoke prior to trial. EH, 32. He also told trial counsel when he got a chance to speak to him in the hallway during trial. EH, 32. Mr. Pippen's trial attorney never contacted Hudson prior to trial or called him as a witness. EH, 32.

Likewise, Hudson was never contacted by the prosecution or the police. EH, 32. Hudson would have been willing to testify as a witness for Mr. Pippen. EH, 33. He attended Mr. Pippen's trial and he was present when Sean McDuffie lied under oath. EH, 33.

At the time of the evidentiary hearing Mr. Hudson was on parole and had violated his parole by not reporting. EH, 40. He came to court to testify at the *Ginther* hearing knowing that it was likely that he was going to get arrested for the parole violation. EH, 40, 41. When asked why he was willing to put himself at risk of arrest, Hudson replied, "Because I know what Shawn [sic] McDuffie had told them is a lie, and even though I'm not charged or didn't have nothing to do with it, it's just crazy for me to just sit up here and not tell them that this is a lie." EH, 40.

Following Mr. Hudson's testimony, the prosecution called Bud Barnett an investigator with the Absconder Recovery Team for the Michigan Department of Corrections. EH, 42. Barnett testified that the prosecutor had contacted him to advise him that Michael Hudson would be appearing in court. EH, 43. At the courthouse, before the evidentiary hearing began, Barnett approached Mr. Hudson and told him that there was a warrant for his arrest and that if he stayed on the floor where the hearing was happening, he could testify, but if he left, he would be taken into custody. EH, 44.

On April 16, 2015, the trial court denied Mr. Pippen's new trial motion. EH3, 1-8. It found that trial counsel's performance was not objectively unreasonable. The court did not

address the prejudice prong of the *Strickland* standard at that time. EH 3, 7-8.

Appeal to Court of Appeals and Michigan Supreme Court

After briefing by the parties and oral argument, the Court of Appeals issued a per curiam opinion affirming Mr. Pippen's convictions. *People v Pippen*, unpublished opinion per curiam of the Court of Appeals, decided January 14, 2016 (Docket No. 321487) (Appendix A).

Mr. Pippen then sought leave to appeal in this Court. The Court ordered oral argument on Mr. Pippen's application for leave to appeal the affirmance of his convictions and requested supplemental briefing regarding "whether the defendant was denied the effective assistance of counsel based on counsel's failure to adequately investigate and present testimony from a res gestae witness." *People v Pippen*, 500 Mich 937 (2017) (attached as Appendix B).

After supplemental briefing and oral argument, this Court issued a unanimous order[5], stating in pertinent part:

> In lieu of granting leave to appeal, we REVERSE that part of the Court of Appeals judgment holding that the defendant's trial counsel's performance was objectively reasonable. Defense counsel failed to interview a witness who may have had information concerning his client's innocence prior to trial. The witness gave exculpatory statements to the defense investigator, and defense counsel was aware the witness spoke with the investigator. Failure to investigate such a witness is not a strategic decision entitled to deference. See *Wiggins v Smith*, 539 US 510; 123 S Ct 2527; 156 L Ed 2d 471 (2003); and *Towns v Smith*, 395 F3d 251 (CA 6, 2005). We also VACATE that part of the Court of Appeals judgment holding that the defendant was not prejudiced by defense counsel's performance, and we REMAND this case to the Wayne Circuit Court for a determination whether, considering the totality of the evidence presented, there is a reasonable probability that the outcome of the trial was affected. See *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

People v Pippen, 501 Mich 902 (2017) (Appendix C).

[5] Wilder, J. did not participate because he was on the Court of Appeals panel.

Proceedings on remand from the Michigan Supreme Court

On November 16, 2018, after supplemental briefing and argument by the parties, the trial court again denied Mr. Pippen's motion for new trial. *Trial Court Opinion & Order Denying Motion for New Trial* (Appendix D).[6] The court found that "Michael Hudson was not a believable witness and based upon his testimony regarding the circumstances of the discarding of the firearm, his five theft-related felony convictions and his lengthy friendship with the defendant, a reasonable jury would not credit his testimony." Appendix D at 4. It further found that the testimony of Sean McDuffie was "corroborated by other surviving witnesses at the scene," and there was "strong circumstantial evidence that less than 90 days after the murder, defendant Pippen was in possession of the murder weapon." Appendix D at 5.

Ultimately, the court concluded that the totality of the evidence presented did not persuade the court of a reasonable probability of a different outcome. Appendix D at 6. The court did not cite any authorities or the record in support of its findings.

Mr. Pippen timely filed a brief in the Court of Appeals. On April 30, 2020, the Court of Appeals issued an unpublished opinion affirming Mr. Pippen's convictions. Appendix E.

[6] The court reissued the opinion on December 19, 2018, because it was not served on counsel until December 18, 2018.

Argument

I. The trial court abused its discretion in finding that trial counsel's failure to investigate and present an exculpatory res gestae witness did not prejudice Mr. Pippen. Mr. Pippen made the necessary showing under the *Strickland* standard and is entitled to a new trial.

Issue Preservation and Standard of Review

Mr. Pippen filed a timely motion for new trial on the issue of ineffective assistance of counsel and thus preserved this issue for appellate review. *People v Wilson*, 242 Mich App 350, 352 (2000).

A defendant accused of a crime has the right under the federal and state constitutions to the effective assistance of counsel. US Const Am VI; Const 1963, Art 1, § 20; *Strickland v Washington*, 466 US 668 (1984). Ineffectiveness claims present mixed questions of law and fact. *Strickland*, 466 US at 698; *People v LeBlanc*, 465 Mich 575, 579 (2002). Questions of law are reviewed de novo. *Id*. Questions of fact are reviewed for clear error. *Id*.; MCR 2.613(C).

A trial court's decision to grant or deny a new trial is reviewed for an abuse of discretion. *People v Terrell*, 269 Mich App 553, 558 (2010). A trial court necessarily abuses its discretion when it makes an error of law. *People v Everett*, 318 Mich App 511, 516 (2017).

Introduction

The testimony proffered by Michael Hudson, which was available to defense counsel at the time of trial, exculpates Mr. Pippen. It also directly impeaches the prosecution's key witness, an incredible individual who had a personal interest in testifying against Mr. Pippen. And as this Court concluded, trial counsel's failure to investigate and call Mr. Hudson was objectively unreasonable.

The remaining question before the trial court was whether, "considering the totality of the evidence presented, there is a reasonable probability that the outcome of the trial was affected."

People v Pippen, 501 Mich 902 (2017); see also *Strickland*, 466 US at 694. *Strickland* stated that a reasonable probability is "probability sufficient to undermine confidence in the outcome." *Id.* A reasonable probability need not rise to the level of making it more likely than not that the outcome would have been different. *Id.* at 693.[7]

Mr. Pippen made the showing required to obtain a new trial under the *Strickland* standard, but the trial court failed to engage in a proper holistic review which entails weighing all the evidence in the record, favorable and unfavorable, and its denial of relief on this basis constituted an abuse of discretion. *Strickland*, 466 US at 685 (in assessing prejudice, the court must evaluate "the totality of the evidence before the judge or jury."); see also *Johnson/Scott*, 502 Mich at 571.

Recently, in *People v Johnson/Scott*, 502 Mich 541 (2018), this Court outlined how the trial court is to assess whether new evidence creates a reasonable probability of a different outcome upon retrial. First, the court must determine whether "a reasonable juror could" find the new evidence credible; if so, then the second step is to determine whether, in conjunction with the rest of the record, the new evidence creates a reasonable probability of a different outcome upon retrial. *Johnson/Scott*, 502 Mich at 570–72. The principles at play in *Johnson/Scott*—the role of the trial court in assessing credibility and resolving conflicting evidence, and the importance of evaluating the "new" evidence in light of the evidence presented at trial—are not

[7] And the Sixth Circuit noted in another context that under Michigan law, a "reasonable probability" equates to a "fairly good chance." *Bell v United States*, 854 F2d 881, 889 (CA 6, 1988); *id.* at 889-90 ("the Michigan standard . . . does not require [a] mathematically exact . . . better than 50% chance of a successful outcome. Instead, evidence that there was a reasonable probability of such outcome, that the probability was . . . 'fairly good,' is sufficient.").

novel [8] and apply equally to questions of prejudice in the ineffective assistance of counsel context. See *Strickland*, 466 US at 695 (defining prejudice in terms of the effect of counsel's errors on the outcome of the proceedings, based on the "totality of the evidence before the judge or jury"); see also *Johnson/Scott,* 502 Mich at 576 n 16 (stating that *Brady* and *Strickland* cases are instructive in assessing materiality because both "require an assessment as to whether the new evidence or ineffective assistance calls into question the validity of a prior conviction.").

In its short opinion that never once cited to the record or case law, the trial court below made two significant analytical errors. First, in concluding that "Mr. Hudson was not a believable witness"[9] the trial court only considered factors that it found tended to diminish the veracity of Mr. Hudson's testimony and ignored those objective factors that bolstered it. As a result, the court over-stepped its gatekeeping role and concluded that "a reasonable jury would not credit [Hudson's] testimony", though Hudson was not a patently incredible witness. Second, the court failed to consider whether Hudson was sufficiently credible when considered in combination with the evidence presented at trial, instead viewing the new evidence in isolation. Rather than examining the "totality of the evidence presented" at trial, as it purported to,[10] the

[8] *See also People v Grissom*, 492 Mich 296, 317 (2012) (citing *White v Coplan*, 399 F3d 18, 24–25 (CA 1, 2005) and *Napue v Illinois*, 360 US 264 (1959), which discuss how a *jury on retrial* might view new impeachment evidence); *People v Lewis*, 64 Mich App 175, 185 (1975) (at post-conviction hearing, "[t]he trial judge may not [decide] whether he thinks the witnesses are in fact telling the truth, for that is a function of the jury upon retrial.); *Ramonez v Berghuis*, 490 F3d 482, 490 (CA 6, 2007) ("[O]ur Constitution leaves it to the jury, not the judge, to evaluate the credibility of witnesses in deciding a criminal defendant's guilt or innocence."); *Matthews v Abramajtys*, 319 F3d 780, 790 (CA 6, 2003) ("The actual resolution of the conflicting evidence, the credibility of witnesses, and the plausibility of competing explanations is exactly the task to be performed by a rational jury."); *Barker v Yukins*, 199 F3d 867, 874–75 (CA 6, 1999) (Post-conviction court should not "stand in the place of the jury, weighing competing evidence and deciding that some evidence is more believable than others. Rather, it is for the jury . . . to decide [who to believe].").

[9] Appendix D at 4.

[10] Appendix D at 5.

court focused only on the inculpatory evidence and completely failed to consider McDuffie's significant credibility problems.

As explained below, there are many reasons to credit Mr. Hudson's exculpatory information over the flawed, incentivized inculpatory testimony of McDuffie at trial, which one judge disbelieved enough to quash the bindover and dismiss the information. And in this case, where a new trial would boil down to a credibility contest between McDuffie and Hudson, the question of whether Hudson was believable for purposes of evaluating Mr. Pippen's guilt or innocence is properly a jury question. See *Ramonez v Berghuis*, 490 F3d 482, 490 (CA 6, 2007). Therefore, there is a reasonable probability of a different outcome upon retrial, and the trial court abused its discretion in denying the motion for new trial.

A. The trial court erred in finding that no reasonable juror could find Mr. Hudson credible because it failed to consider the factors that bolstered the veracity of Mr. Hudson's testimony, placed undue emphasis on his criminal history, and mischaracterized his testimony at the evidentiary hearing.

To assess whether there would be a reasonable probability of a different outcome upon retrial, the trial court must first determine whether the evidence is credible, by considering "all relevant factors tending to either bolster or diminish the veracity of the witness's testimony." *Johnson/Scott*, 502 Mich at 566–67; see also *Ramonez*, 490 F3d at 491 (habeas granted due to ineffective assistance of counsel because "[e]ven though the jury could have discredited the potential witnesses here based on factors such as bias and inconsistencies in their respective stories, there certainly remained a reasonable probability that the jury would not have."). At this initial credibility determination stage, a trial court may only deny the motion if the testimony is so unbelievable, that no reasonable juror "could find the testimony credible on retrial." *Johnson/Scott*, 502 Mich at 566–67. Importantly, "the trial court's function is limited" at this stage, and it is to determine *not whether the court itself finds* the new evidence credible, rather

"whether a *reasonable juror* could" do so. *Id*. (emphasis in original); see also *Kotteakos v United States*, 328 US 750, 764 (1946) ("The crucial thing is the impact of the [error] on the minds of other men, not one's own, in the total setting.").

Johnson/Scott made clear that the ultimate determination of a witness's credibility is to be left for a jury upon retrial. *Id.* at 567–68. And *Johnson/Scott*'s holding on this point followed clearly from a series of cases that evaluated the reasonable probability of a different outcome standard in various contexts, including ineffective assistance of counsel claims. See footnote 8, *supra*.

Here, the trial court failed to apply this standard. It did not consider Mr. Hudson's testimony in its entirety and failed to acknowledge its reliable aspects including that Mr. Hudson had provided the same information when questioned prior to trial. Moreover, it gave undue weight to Mr. Hudson's ten-year old prior convictions and adopted the prosecutor's baseless argument that Mr. Hudson's testimony concerning Pippen's discarding of a firearm on October 18, 2008, was incredible. Michael Hudson is not patently incredible. In finding him to be so, the trial court clearly erred.

Furthermore, the trial court ignored the reality that, according to the prosecution, Michael Hudson is a key res gestae witness. T2, 25, 27, 29, 35. The trial court's function at the initial credibility determination stage is "limited," *Johnson/Scott*, 502 Mich at 567, and it's "gatekeeping role" cannot be used to keep out such an obvious material witness. Cf. *People v Mardlin*, 487 Mich 609, 626 (2010) ("Indeed, 'a basic premise of our judicial system [is that] providing more, rather than less, information will generally assist the jury in discovering the truth.'") (internal citation omitted).

1. *Mr. Hudson's criminal history has little bearing on his credibility regarding the facts at issue.*

In concluding that Hudson was not a credible witness, the court relied heavily on the fact that he had a criminal history: "At the time of his testimony, Mr. Hudson was a parole absconder and someone with five theft-related convictions which seriously impacted his credibility." Appendix D at 4.

Although it is appropriate for a trial court to take into account weaknesses in a witness's testimony, the trial court failed to determine whether a reasonable juror might conclude that Hudson was nonetheless credible with regard to the facts at issue here. As this Court has recently and repeatedly acknowledged, it is error to conclude that the existence of prior convictions inevitably makes a witness incredible in the eyes of a fact-finder. See *People v Corley*, 503 Mich 1004 (2019) (holding that the trial court's finding that a witness's criminal history made him not credible as a general matter was erroneous); see also *Johnson/Scott*, 502 Mich at 570 (witnesses' prior conviction for perjury did not make him incredible per se and trial court erred in failing to determine whether a reasonable juror might conclude that the witness was nonetheless credible with regard to the facts at issue). Rather, the focus must be on whether a reasonable juror might conclude that the witness was nonetheless credible.

Next, to the extent the trial court presumed that these prior convictions would have been admissible, it erred in its analysis by disregarding the preliminary legal questions controlling their admissibility. MRE 609(a)(2)(B) only allows a prior conviction for a theft offense to be used to impeach a witness if "the court determines that the evidence has significant probative value on the issue of credibility . . ." In making the probative value determination as required by subrule (a)(2)(b), "the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity." MRE 609(b).

The trial court failed to consider that Mr. Hudson's prior theft-related convictions were 9 and 11 years old at the time of trial and even older at the time of the evidentiary hearing. Hudson acknowledged pleading guilty to three counts of larceny of a motor vehicle in 2005, one count of receiving and concealing stolen property motor vehicle in 2004, and one count of receiving and concealing stolen property motor vehicle in 2003. EH, 32-33. Mr. Pippen's trial took place in March of 2014. Depending on the date of the conviction and/or the date upon which Mr. Hudson was released from the confinement imposed for that conviction, some of Mr. Hudson's prior convictions may have been inadmissible under MRE 609(c).

Even assuming all five of Mr. Hudson's prior convictions fell within the 10-year time limit proscribed by MRE 609, their nature and vintage make them of minimal probative value and thus of little bearing on Mr. Hudson's character for truthfulness and likely inadmissible. See MRE 609(a)(2)(b). Hudson's prior convictions are theft-crimes. Our courts have held that "theft crimes are minimally probative on the issue of credibility," *People v Meshell*, 265 Mich App 616, 635 (2005), or at most, are "moderately probative of veracity . . ." *People v Allen*, 429 Mich 558, 610-11 (1988). And as a general matter, the older a prior theft-crime conviction, the less probative it is on the issue of a witness's credibility. *People v Snyder*, 301 Mich App 99, 106 (2013). Indeed, in *Allen*, this Court explained that the only factor that counseled in favor of increasing the probative value of a theft-crime was its recentness. *Allen*, 429 Mich at 610-11.

Mr. Hudson's prior convictions have little bearing on his credibility, particularly given the age of the offenses. They were far from recent and neither the trial court nor the prosecutor gave any other reason why these convictions were indicative of Mr. Hudson's character for truthfulness.

Moreover, it is undisputed that Hudson willingly testified at the hearing, despite knowing that by coming to court he would likely be arrested for violating his parole for failing to report. EH, 40. And, as he anticipated, he was arrested in the courthouse following the hearing. EH, 42-44. Mr. Hudson had not violated his parole at the time of Mr. Pippen's trial, see EH, 43, and at a retrial, that fact would not be admissible.

The court's emphasis on Mr. Hudson's criminal history and its bearing on credibility stands in stark contrast with its complete lack of analysis of similar considerations vis-à-vis Sean McDuffie. As discussed in detail, *infra*, any potential impeachment of Mr. Hudson because of his prior convictions must be weighed against the credibility of Sean McDuffie, who, as the jury learned, had a criminal history as well. In sum, the trial court erred in finding no reasonable juror would credit Mr. Hudson because of his prior convictions.

2. *Mr. Hudson's testimony at the evidentiary hearing is consistent with the statements he made prior to Mr. Pippen's trial.*

The court also ignored critical evidence that Hudson's testimony at the evidentiary hearing in 2015 was consistent with his statements made pre-trial, and not a last-ditch effort to help his friend as the court insinuated. See Appendix D at 6.[11] From the time he learned of the accusations, Mr. Hudson has consistently asserted that McDuffie was lying. Private investigator Miguel Bruce interviewed Hudson prior to trial in 2014 and Hudson told him then that what McDuffie was saying was not true and that he was not present or a witness to what McDuffie claimed occurred. EH, 22. At that time Mr. Hudson also expressed his willingness to testify as a witness for Mr. Pippen. EH, 23. Mr. Bruce, who has significant experience interviewing witnesses and investigating homicides as a private investigator and a Detroit Police homicide

[11] The trial court wrote, "Efforts on the part of Michael Hudson to provide some exculpatory evidence he was not with Mr. Sean McDuffie and did not see the defendant throw the murder weapon under the vehicle were unconvincing." Appendix D at 6.

detective, EH 18-19, found Hudson to be credible and communicated as much to trial counsel, EH 23-24.

That Hudson has been consistent in his rejection of McDuffie's allegations is important. He did not appear with exculpatory information only after Mr. Pippen was convicted for the crime. Compare *People v Barbara*, 400 Mich 352, 362-363 (1977) (where newly discovered evidence takes the form of recantation testimony, it is traditionally regarded as suspect and untrustworthy). He talked to Mr. Pippen's family, he met with the private investigator they hired, and he spoke with trial counsel at the courthouse during the trial. Though never questioned by the police or prosecutor's office about a homicide where, by McDuffie's account, he was the getaway driver, Hudson was willing to get involved and to testify under oath. Moreover, Mr. Bruce, an experienced investigator and former Detroit Police Officer found Mr. Hudson to be believable. These facts tend to bolster Mr. Hudson's veracity and the trial court erred in failing to consider these factors at all.

3. *The record does not support a claim that Mr. Hudson attempted to deny that Mr. Pippen was in possession of a firearm at the time of his arrest on Seven Mile.*

In finding fault with Mr. Hudson's testimony about the incident on Seven Mile, the trial court mischaracterized the facts and drew conclusions unsupported by the record. Appendix D at 4. The trial court stated that "Mr. Hudson had an inability to recall the details of Mr. Pippen's conduct with regards to the possession or lack of possession of a firearm" and concluded that "Mr. Hudson conveniently was forceful and emphatic in proclaiming witness McDuffie was not truthful, but was vague and without much recall ability when it came to a description of the defendant's conduct." Appendix D at 4.

Mr. Hudson's testimony about his and Mr. Pippen's conduct at the time of their arrest on Seven Mile was neither "vague" nor "without much recall ability." Appendix D at 4; see also Appendix F for the full transcript of Hudson's testimony. Mr. Hudson readily acknowledged that he was carrying a gun that evening, that he ran from police when they attempted to stop him, that he knew Mr. Pippen to carry a gun, and that he was aware Mr. Pippen also pled guilty to gun charges following their arrest that day. EH, 30, 34-37. Indeed, the only part of the incident on Seven Mile Hudson could not recall in detail was what Mr. Pippen was doing when Hudson was running from the police and kicking his own gun under a car. Hudson by no means suggested that Mr. Pippen did not discard a firearm—he merely stated that he did not physically see it happen because they parted ways when the police commanded them to stop. EH, 36-37.

As Chief Justice McCormack (then Justice McCormack) noted when the prosecutor made this argument at oral argument on the application for leave to appeal, the record simply does not support a claim that Hudson attempted to deny that Mr. Pippen was in possession of a firearm. Indeed, Mr. Pippen's possession of the firearm in question is not in dispute.

J. McCormack: . . . I went back and read the transcript because I wanted to see what Hudson said as opposed to what the police officer said and I guess I don't see the conflict that you're noting. I mean Hudson said that he did not see the defendant kick the gun under the car, but it sounds like he was pretty busy kicking his own gun under the car. And the fact that the defendant possessed that gun was not in dispute, he pled guilty to that. So, I guess I'm missing why the fact that Hudson didn't watch the defendant at the time he himself was being arrested and kicking his own under the car is very relevant.

I mean I think what your point is he is an accomplice, at least we know, in the gun-kicking incident to the defendant, so therefore he may well be, a jury could find he wants to give favorable testimony to the defendant, but McDuffie is their accomplice too, right? They're all in this together. They were all apparently in the car together when this homicide happened?

Prosecutor: So that's why there would have been an accomplice instruction for Hudson as there was for McDuffie.

J. McCormack: Yeah, so accomplice/accomplice. Benefit for testimony/10-year-old prior theft convictions. I'm still thinking I might want to put him up there if this is my case.

Prosecutor: Well . . . the police officer testified that . . . the two of them, defendant and Hudson, walked in between these two cars, then it was defendant that first kicked his gun under a car, then it was Hudson that followed suit . . I don't think a jury would have believed that Hudson didn't see the defendant kick the gun under the car when he kicked his gun under the same car that the defendant kicked his gun under.

J. McCormack: But Hudson said later that he knew the defendant pled guilty to possession of that gun, so he was fully aware and fully admitted at the hearing that the defendant had that gun.[12]

Michael Hudson is not a choir boy and his testimony certainly would have provided some "grist for the cross-examination mill." *Ramonez*, 490 F3d at 490. But it also contained many reliable aspects, which the trial court failed to acknowledge. When considering Hudson's testimony in its entirety, it is clear it is not wholly incredible, as the trial court found, and that a reasonable juror could find it worthy of belief on retrial. See *Johnson/Scott*, 502 Mich 570-568. Therefore, the trial court clearly erred when it concluded that Hudson was not a believable witness. *Id*.

B. The trial court failed to consider whether a reasonable juror would find Mr. Hudson's testimony sufficiently credible, when considered in combination with all the old evidence, favorable and unfavorable, to create a reasonable probability of a different outcome.

Mr. Hudson's potential testimony must be viewed against the evidence presented at trial. *Strickland*, 466 US at 685 (in assessing prejudice, the court must evaluate "the totality of the evidence before the judge or jury."); see also *Johnson/Scott*, 502 Mich at 571. When conducting the *Strickland* prejudice inquiry, a reviewing court must consider whether a reasonable juror would find the new evidence sufficiently credible, when considered in combination with the old

[12] Transcribed from the video recording of the October 12, 2017 oral argument, available at: https://www.youtube.com/watch?v=02W9TZUGbvQ (accessed May 27, 2019).

evidence, to create a reasonable probability of a different outcome. See, e.g., *Wiggins v Smith*, 539 US 510, 513 (2003) (emphasizing that the new evidence, *taken as a whole*, might well have influenced the jury's decision) (emphasis added).

This murder case boiled down to whether Sean McDuffie was telling the truth. It rested on the uncorroborated testimony of a single witness who had to be brought to court on a material witness warrant, who received consideration in exchange for his testimony, who waffled on the stand, and whose account of the shooting contradicted the accounts of the other witnesses. T4, 30, 51. Michael Hudson's testimony that he never saw Mr. Pippen shoot anyone is exculpatory and directly contradicts McDuffie's testimony at trial. EH, 31. Because trial counsel failed to investigate and call Mr. Hudson as a witness, the questionable testimony of McDuffie went largely unchallenged. Furthermore, counsel's failure to present Mr. Hudson, especially considering the role Mr. Hudson played in the prosecution's narrative, allowed the jury to draw a negative inference against Mr. Pippen based on Mr. Hudson's absence.

Despite paying lip service to this Court's order that it consider the "totality of the evidence presented," the trial court failed to properly assess the effect of Hudson's testimony in conjunction with the evidence that was presented at trial as it was required to do. *Strickland*, 466 US at 695; *Williams v Taylor*, 529 US 362, 397-398 (2000) (The "State Supreme Court's prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced the habeas proceeding in reweighing it against the evidence in aggravation."); *Johnson/Scott*, 502 Mich at 571-579. Not only did the court completely ignore McDuffie's many credibility problems including his inherent bias as an incentivized witness, its finding that McDuffie's trial testimony was corroborated by the other surviving witnesses at the scene is not supported by the record.

1. *The trial court failed to consider Mr. Hudson's credibility against the credibility of Sean McDuffie and in doing so abused its discretion. This Court should have grave reservations about McDuffie's testimony.*

Foremost, any potential impeachment of Mr. Hudson because of his prior convictions or friendship with Mr. Pippen must be weighed against the credibility of Sean McDuffie. Detroit Police went to McDuffie who had a warrant out for his arrest (and who they were familiar with due to his cooperation with police on another homicide) and interrogated him about "a whole bunch of shootings." PE, 60, 64-65, T4, 55-56, 75. They showed him pictures of homicide scenes and a picture of Mr. Pippen and asked for information about Mr. Pippen's involvement in the Sheffield homicide, which McDuffie then provided. T4, 55-56, 74-75. McDuffie later tried to withdraw his cooperation and was threatened with perjury.[13]

Sean McDuffie's lack of credibility in this case was so patently observable from his testimony that the judge who conducted the preliminary exam, after reviewing the substance of McDuffie's testimony, stated, "I wasn't impressed with his testimony but that's not the Court's decision to, you know, be the decider of fact here." Preliminary Exam Transcript, 101. Then, the initial trial judge quashed the bindover and dismissed the case after concluding it was unclear whether McDuffie was describing the same crime as the other witnesses. See Motion Tr. 9/1/10 at 8-10.

McDuffie was ultimately was brought to Mr. Pippen's trial on a material witness warrant. On direct examination he denied witnessing Mr. Pippen shoot anyone in a black truck, and it was only after being shown his statement to police that he inculpated Mr. Pippen in this crime.

[13] McDuffie testified at the Preliminary Exam: "when I told them I wasn't telling them nothing they had took me down to Judge Kinny [sic]. And then he said they would lock me up for a year. And then after that they was going to charge me with perjury or something, which carries the same amount as the crime committed." Preliminary Exam Transcript, 49.

The jury learned that McDuffie had a prior conviction for carrying a concealed weapon for which he received HYTA probation, that he ultimately violated his probation and had a warrant out for his arrest, and that he was receiving a benefit for his testimony. T4, 50-51, 53-54. In short, as the prosecutor acknowledged in this Court, "Sean McDuffie, did have credibility issues." See People's Supplement to their Brief in Opposition to Defendant's Application for Leave to Appeal at 20. The trial court did not acknowledge or address these admitted credibility issues in its prejudice analysis.

Unlike McDuffie, who was forced to testify and who testified in exchange for a benefit that involved "cancelling" his existing felony case, Michael Hudson would have testified willingly and without obligation or incentive. Indeed, Mr. Hudson testified willingly at the evidentiary hearing despite the risk of being arrested for an unrelated warrant. EH, 40-41. Moreover, unlike McDuffie's prior conviction for carrying a concealed weapon which the jury learned about, Mr. Hudson's prior theft convictions occurred roughly ten years before Mr. Pippen's 2014 trial.

The trial court failed to consider Mr. Hudson's demerits in relation to McDuffie's and in doing so abused its discretion. As Justice Larsen noted while addressing the prosecutor at oral argument: "McDuffie doesn't have a clean record either.. . .your point is that Hudson could have been impeached with his prior convictions and McDuffie had some too, and it's a he-said/he-said, so . . .".[14] Had trial counsel called Mr. Hudson as a witness, "[a]ll it would have taken is for 'one juror [to] have struck a different balance' between the competing stories." *Ramonez*, 490 F3d at 491, citing *Wiggins v Smith,* 539 US 510, 537(2003).

The trial court also ignored or downplayed the problems with McDuffie's trial testimony

[14] Transcribed from the video recording of the October 12, 2017 oral argument, available at: https://www.youtube.com/watch?v=02W9TZUGbvQ (accessed May 27, 2019).

and erroneously concluded that his testimony about the shooting was corroborated by other surviving witnesses at the scene. Appendix D at 4-5.

McDuffie's testimony about the crime itself was fraught with problems. For one, it often lacked corroborating detail:

- McDuffie could not remember the type or color of car that he alleged Mr. Hudson was driving or whose car it was. T4, 37.
- McDuffie could not remember where or when this event happened, but stated that he believed it was near Morang, Kelly, or Houston Whittier [streets] and that it was sometime after 10:00 p.m. sometime during the summer of 2008. T4, 39, 42.
- McDuffie did not remember the victim's car rolling into a tree. T4, 61.

McDuffie's testimony also distinctly contradicted the testimony of the witnesses in the victim's car:

- McDuffie testified that there were three people in the car: Mr. Hudson, Mr. Pippen, and himself. T4, 59.
    - Ms. Larry and Mr. McGrier observed four individuals in the shooter's car. T3, 52, 101.
- McDuffie testified that no one in his car was wearing a mask or a bandanna and that no one in the car leaned out a window. T4, 57
    - Ms. Larry testified that when the car first drove by the man in the front passenger seat was leaning out of the car and his face was covered from the nose down. T3, 52. She further stated that he was still masked when he approached the car a few minutes later. T3, 53.
    - Mr. McGrier testified that the shooter and the three other men in the shooter's car had their faces covered with bandannas or scarves. T3, 101-102.
- McDuffie testified that no one in the car displayed a weapon. T4, 57.
    - Mr. McGrier testified that all four of the men in the car had handguns. T3, 101-102.

At trial, defense counsel attempted to establish that McDuffie was a self-interested liar and his account of the shooting could not be believed. T4, 105 ("What the people have brought

to you is Mr. Sean – Mr. McDuffie, who was given a deal to close out his HYTA on a CCW, every reason to buy that would take away that case for him. That is not justice."); see also EH, 11. But, the jury heard no direct evidence refuting McDuffie's version of events. Instead, defense counsel was relegated to attacking McDuffie's credibility on cross-examination by questioning him about the benefit he received in exchange for his testimony and eliciting the details of his story that contradicted the witnesses in the victim's car. T4, 53-67. In his closing argument the prosecutor acknowledged McDuffie's lack of particularity (T4, 94) and the differences between his testimony and the testimony of Mr. Sheffield's friends (T4 93, 108), but averred that discrepancies in otherwise truthful testimony can be explained by the passage of time and the distorting effect of fear on one's memory (T4, 93).

Mr. Hudson's testimony that he never saw Mr. Pippen shoot anyone would have directly contradicted McDuffie's testimony at trial and would have been direct evidence to the jury that McDuffie was not merely misremembering a traumatic event that happened six years prior, but rather lying to this jury regarding his actions in connection with this case. See *People v Armstrong*, 490 Mich 281, 292 (2011) (where impeachment evidence would have provided proof that a witness lied to the jury regarding his or her actions with regard to that very case, there is a greater possibility that the additional attack "would have tipped the scales in favor of finding a reasonable doubt about defendant's guilt."). In other words, instead of hearing evidence that McDuffie had a motive to lie, drawn out through cross, the jury could have heard direct evidence he was actually lying.

2. *Mr. Pippen's claim of prejudice is supported by the notable weaknesses in the prosecution's case.*

As the trial court acknowledged at the evidentiary hearing, "the prosecution's case essentially rested on the testimony of Shawn [sic] McDuffie" and McDuffie was "a key witness

for the prosecution in terms of placing Mr. Pippen at the scene of the homicide." EH3, 4-5. Outside of McDuffie's inconsistent and incentivized testimony, the only evidence that Mr. Pippen committed this crime was that (1) he fit an extremely vague physical description of the shooter and (2) approximately three months after the shooting he was in possession of the gun that was believed to be the murder weapon.

At trial, testimony was taken from the three individuals who were in the car with the victim: Kyra Gregory, Adam McGrier, and Camry Larry. No one identified Mr. Pippen as the shooter.

- Ms. Gregory was seated in the front passenger seat. T3, 77. When asked if she could describe the man or if the man was tall, she replied, "no." T3, 78.
- Mr. McGrier was seated behind Ms. Gregory in the rear passenger seat. T3, 78. At trial, the only information he could provide about the shooter was his height; he estimated that the man was about six foot. T3, 94.
- When Mr. McGrier spoke to police directly after the incident he described the shooter as having a dark complexion. T3, 106. At trial, he stated that he was not able to tell. T3, 105. Mr. Pippen has a light complexion.
- Ms. Larry, who is 4 feet 11 inches tall, described the shooter as a tall and "little" black man. T3, 54. She agreed that both Mr. Pippen *and* his trial attorney fit this general description. T4, 55, 60.
- Ms. Larry never saw the shooter's face and she was unable to provide any other details about his appearance. T3, 61-62, 72.

The prosecution contended that among Mr. Pippen, Mr. Hudson, and Mr. McDuffie, Mr. Pippen most closely fit the generic physical description of the shooter provided by Camry Larry. T4, 95. In a case where Mr. Pippen has consistently maintained that he was not present and not involved, this evidence is vague and unpersuasive.

Additionally, Mr. Pippen's possession of the weapon three months after the shooting is not compelling evidence of guilt that precludes Mr. Hudson's testimony from creating a reasonable

probability of a different outcome. First, the passage of time is relevant. This is not a case where a defendant is apprehended with the murder weapon hours or days after an offense. Second, there was no independent evidence that Mr. Pippen possessed this gun prior to or around the time of the shooting.

Plainly this was not a gun that Mr. Pippen came to possess legally. Street guns, like this one, change hands. According to the prosecution's own evidence, the gun originally belonged to someone named Darnell "Terry" Hicks who is now dead. T4, 37. Then, Norman Clark, who was present when Mr. Pippen was arrested with the gun on October 18, 2008, bought the gun from Mr. Hicks. T4, 65. Mr. Pippen had no way of knowing everyone who possessed the gun before him or how it was used. Indeed, the fact that Mr. Pippen pled guilty to felony firearm for his possession of this firearm strengthens the argument that he was not aware that the gun he possessed was a murder weapon. The only evidence linking Mr. Pippen to this gun at the time of the shooting was McDuffie.

3. Mr. Hudson is a key player in this story and the trial court failed to consider the impact of his absence at trial.

Finally, the trial court failed to take into account the central role Mr. Hudson played (in absentia) in the prosecution's case. Though he was never interviewed by the police or prosecution, or called as a witness trial, Mr. Hudson was a major part of the story the prosecution presented to the jury. That story claimed there were three people in the world who knew who was responsible for the murder of Brandon Sheffield: Sean McDuffie, Roderick Pippen, and Michael Hudson. The jury was repeatedly told that both McDuffie and Mr. Hudson witnessed Mr. Pippen commit this crime (T2, 25, 27, 29, 35), and Mr. Hudson's name was mentioned 15 times in the prosecution's opening statement alone (T2, 24-36).

During McDuffie's testimony, the prosecutor inquired about his relationship with Mr.

Hudson and asked him to identify a photograph of Mr. Hudson, entered into evidence as People's Exhibit 17. T4, 45. The prosecution then elicited testimony from McDuffie that Mr. Hudson was present when the shooting took place and that "he was just as shocked as [McDuffie] was" when it occurred. T4, 46. This narrative was reiterated in closing argument, and the prosecutor reminded the jury that McDuffie had identified photographs of both Mr. Pippen and Mr. Hudson. T5, 95.

Considering that McDuffie placed Mr. Hudson with Mr. Pippen during the crime, the jurors in this case no doubt wondered whether Mr. Hudson was going to testify. See *Stewart v Wolfenbarger*, 468 F3d 338, 360 (CA 6, 2007); *Washington v Smith*, 219 F3d 620, 634 (CA 7, 2000). When Mr. Hudson did not testify, the jury likely assumed that the prosecution did not need him, and the defense did not want him. Trial counsel's failure to investigate and call Mr. Hudson as a witness allowed the jury to draw a negative inference against Mr. Pippen based on Mr. Hudson's absence. *Stewart*, 468 F3d at 360 (counsel prejudices his client's defense when counsel fails to call a witness who is central to establishing the defense's theory-of-the-case, and the jury is thereby allowed to draw a negative inference from that witness's absence). This is especially so given the role that credibility and witness testimony played in this case. See *Harrison v Quarterman*, 496 F3d 419, 427-28 (CA 5, 2007).

Mr. Hudson is a key player in this story, who the prosecution used at trial but now want to keep from the jury now that they know his testimony would be exculpatory. This is fundamentally unfair. It is also a dynamic the trial court failed to consider when it concluded Hudson's testimony was of no consequence.

C. Errors in the Court of Appeals Analysis

The Court of Appeals made several critical errors in affirming Mr. Pippen's convictions although his lawyer's performance was objectively unreasonable. As an initial matter, the Court of Appeals distorted the nature and significance of Michael Hudson's testimony, largely by failing to consider it in context of the state's case as required. The court wrote, "Hudson's testimony would have likely had a minimal effect on the credibility of McDuffie's version of events, considering Hudson's general denials do not amount to an assertion that Pippen did not shoot the victim." Appendix E at 3. But they did amount to an assertion that Pippen did not shoot the victim. Hudson directly and completely rejected McDuffie's version of events, which was the prosecution's theory of the crime. He insisted that McDuffie was lying and that he had never seen Mr. Pippen shoot anyone, ever. Though the court insinuates that Hudson's denials were the wrong kind ("At the *Ginther* hearing, Hudson generally denied ever observing Pippen shoot anyone, and generally asserted McDuffie's claims were false."), it is unclear how much more specific Hudson could have been about an event he did not witness. Appendix E at 3. Indeed, as this Court recognized in its order reversing the Court of Appeals' conclusion that trial counsel's performance was objectively reasonable, Hudson's statements were "exculpatory." Appendix C.

Perhaps the Court of Appeals is trying to say that because Hudson denied witnessing the shooting, he does not know definitively whether Mr. Pippen is responsible or not. But that does not make his testimony any less significant. Mr. Pippen does not have to prove his innocence beyond a reasonable doubt in order to succeed on an ineffective assistance of counsel claim. His burden is to show that counsel's failure to investigate undermines confidence in the outcome. *Strickland*, 466 US at 694. And to assess whether there is a reasonable likelihood of a different result, a reviewing court must consider the error in the context of the evidence presented at trial

and the prosecution's theory of the crime. *Strickland*, 466 US at 694-696; see also *Grant*, 470 Mich at 495.

After dismissing Hudson's testimony as immaterial, the Court turned its attention to Hudson's credibility and repeated many of the same flawed arguments it made in its original prejudice analysis, which this Court vacated. See Appendices A and C.[15] These errors—namely rejecting Hudson out of hand because of his ten-year-old prior theft convictions and mischaracterizing his evidentiary hearing testimony about the incident on Seven Mile—have been addressed at length above. New to this Court of Appeals' opinion, however, is the incongruous argument that Hudson's willingness to testify at the evidentiary hearing despite the risk of incarceration shows that he was a biased witness.[16] Appendix E at 5. Typically, courts recognize bias where it is in a witness' self-interest to testify, not where there are disincentives. *People v Layher*, 464 Mich 756, 762 (2001), citing *United States v Abel*, 469 US 45, 52 (1984) ("Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest.").

Mr. Hudson was friends with both Mr. Pippen and McDuffie, and these relationships would provide fodder for cross-examination and argument. But testifying under oath despite personal risk to himself does not inherently make Hudson a biased or incredible witness.

[15] After this Court vacated the Court of Appeals' judgment holding that Mr. Pippen was not prejudiced by defense counsel's performance and remanded to the trial court to determine whether there is a reasonable probability that the outcome of the trial was affected, the prosecutor filed a supplemental brief after remand urging the trial court to adopt the vacated prejudice analysis: "The People are in full agreement with the Court of Appeals' analysis as to the prejudice prong, and the People see no impediment to this Court adopting that reasoning as its own." *People's Supplemental Brief After Remand 12/7/17* at 30.

[16] The Court wrote, "Although Pippen suggests that Hudson's willingness to testify despite the fact that he would likely (and in fact was) arrested for absconding is evidence suggesting that he was telling the truth, the trial court did not find that to be true. If anything, his willingness to risk incarceration in an attempt to assist his friend, Pippen, shows that he was a biased witness." Appendix E at 5.

Especially where the record is clear that Hudson's statements at that evidentiary hearing were consistent with what he told Investigator Bruce before Mr. Pippen's trial—long before he risked incarceration for violating parole. Where trial counsel was constitutionally ineffective for failing to investigate Hudson and call him as a witness at trial, Hudson should not be faulted for some invented bias that did not exist at the time of trial (and is not generally recognized by our case law) and thus would not have been a consideration for the jury.

Next, the Court of Appeals clearly erred in concluding that McDuffie was so thoroughly impeached at trial that Hudson's testimony was "not necessary." See Appendix E at 5 ("Hudson's testimony was also not necessary to impeach McDuffie's testimony because McDuffie was a hostile witness." and "Considering the scope of Pippen's lawyer's impeachment efforts at trial, Pippen has not demonstrated a reasonable probability that Hudson's general denial of the veracity of McDuffie's testimony would have further impeached McDuffie or produced a different result at trial."). This argument is nonsensical and does exactly what this Court denounced in *People v Armstrong*, 490 Mich 281, 291 (2011) (finding that the Court of Appeals erred in concluding that no prejudice resulted from defense counsel's failure to introduce additional impeachment evidence because the complainant's credibility had been "thoroughly impeached."); see also *Trakhtenberg*, 493 Mich at 56-57 ("[T]he reliability of defendant's convictions was undermined by defense counsel's failure to introduce impeachment evidence and evidence that corroborated defendant's testimony.").

McDuffie may have been a hostile witness for the prosecution, but he was not a friendly witness to the defense. Indeed, he was the only witness who put Mr. Pippen at this crime. Accordingly, it was trial counsel's defense strategy to attack McDuffie's credibility by showing him for what he was—someone who was testifying to help himself out in his own case. And, as

the Court of Appeals noted, McDuffie hurt his own credibility by providing testimony that lacked detail and contradicted the eyewitnesses to the crime. See Appendix E at 5. Still, the attacks on McDuffie's credibility at trial were inconclusive. Because Hudson's testimony was significant—after all the prosecution claimed he was a res gestae witness—and was not cumulative[17], "a reasonable probability exists that this additional attack on the [witness'] credibility would have tipped the scales in favor of finding a reasonable doubt about defendant's guilt." *Armstrong*, 490 Mich at 292.

Finally, the Court of Appeals erroneously concluded that the limitations on the trial court's ability to make credibility determinations in determining the propriety of granting a new trial as outlined in *People v Johnson/Scott* are not applicable where the new evidence is the result of counsel's failure to investigate. Appendix E at 6. As detailed above, there are several reasons why the *Johnson/Scott* Court's holding concerning the role of the trial court in assessing credibility should apply equally in the ineffective assistance of counsel context.

While different legal claims, the tests for ineffective assistance of counsel and newly-discovered evidence employ the same prejudice standard: the defendant must show a reasonable probability of a different outcome. See *Strickland*, 466 US at 694; see *Johnson/Scott*, 502 Mich at 577, citing *People v Tyner*, 497 Mich 1001 (2003). Indeed, in *Johnson/Scott* this Court looked to ineffective assistance of counsel cases in order to assess the materiality of the new evidence in the case before them. It stated that ineffective assistance of counsel cases are instructive in assessing prejudice in the newly-discovered evidence context because *Strickland*, like *Cress*[18],

[17] The "scope" of Mr. Pippen's lawyer's impeachment efforts was limited to cross-examination about the benefit McDuffie received in exchange for his testimony and prior inconsistent statements. See Appendix E at 5.

[18] *People v Cress*, 468 Mich 678, 692 (2003); see also *People v Grissom*, 492 Mich 296, 321 (2012) (ordering "the trial court [on remand to] carefully consider the newly discovered evidence in light of the evidence presented at trial").

requires the reviewing court to assess the totality of the evidence to determine whether the "new evidence or ineffective assistance" calls into question the validity of a prior conviction. *Johnson/Scott*, 502 Mich at 576 n 16.

Furthermore, as claims of ineffective assistance of counsel are constitutional claims guaranteed by the Sixth Amendment to the United States Constitution, it makes little sense that this Court would provide more protection for criminal defendants who are presenting newly-discovered evidence, than those whose convictions are unreliable because of a breakdown in the adversarial process that our system counts on to produce just results. *Strickland*, 466 US at 696. As the United States Supreme Court stated in *Strickland*, when explaining why it rejected the outcome-determinative standard which was, at least at that time, widely used for assessing motions for new trial based on newly discovered evidence:

> Even when the specified attorney error results in the omission of certain evidence, the newly discovered evidence standard is not an apt source from which to draw a prejudice standard for ineffectiveness claims. The high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged. Cf. *United States v Johnson*, 327 US 106, 112 (1946). An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower.
>
> Accordingly, the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, *United States v Agurs*, 427 US at 104, 112–113, and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness, *United States v Valenzuela–Bernal*, *supra*, 458 US at 872–874.

Strickland, 466 US at 693-694 (cleaned up).

There is no reason why the trial court should have a more unrestricted role in assessing credibility where an attorney's deficient performance has resulted in the omission of certain evidence than where new evidence was discovered after a presumptively accurate and fair

proceeding. The court's role with respect to assessing credibility is as a gatekeeper—it should not stand in the place of the jury. See *Ramonez*, 490 F3d at 490; *Matthews v Abramajtys*, 319 F3d 780, 790 (CA 6, 2003); *Barker v Yukins*, 199 F3d 867, 874–75 (CA 6, 1999).

D. Conclusion

Mr. Hudson's testimony is sufficiently credible to warrant a new trial, where cross-examination can take its proper course. Even though the jury could have discredited Mr. Hudson based on factors such as bias or prior criminal history, there certainly remained a reasonable probability that the jury would not have. *Ramonez*, 490 F3d at 490-91. Just because a witness may have certain bases for impeachment upon retrial does not mean that the court may simply decline to grant a new trial. *Id*. at 490. The Court made this clear in *Johnson/Scott*, where it concluded that the trial court abused its discretion in denying a new trial, even though the new eyewitness had significant credibility problems (i.e. a perjury conviction).

Like in *Johnson/Scott*, Mr. Pippen's conviction rested on "shaky ground" and the new evidence, while imperfect, is sufficient to create a reasonable probability of a different outcome. *Johnson/Scott*, 502 Mich at 571-579; see also *Strickland*, 466 US 696 ("a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."); see also *United States v Agurs*, 427 US 97, 114 (1976).

Even if this Court were to disagree that a trial court's credibility determination when assessing prejudice in the ineffective assistance of counsel context is concerned with whether a reasonable juror could find the testimony credible on retrial, Mr. Pippen is nonetheless entitled to a new trial because the trial court failed to properly assess the effect of Mr. Hudson's testimony in conjunction with the evidence that was presented at trial as it was required to do. In other

words, it failed to consider prejudice in light of the totality of the evidence, as required by *Strickland* and this Court's remand order.

When considered against all the evidence presented at trial, the importance of Michael Hudson's testimony cannot be underestimated. Not only is it evidence that Mr. Pippen did not commit this crime, it would have directly contradicted Mr. McDuffie's testimony at trial and would have corroborated the defense that Mr. McDuffie was lying in exchange for a benefit in his own case. Indeed, the failure to adequately investigate and call Hudson as a witness was the kind of error that altered the entire evidentiary picture. *Strickland*, 466 US at 695-696.

Considering the totality of the evidence in this circumstantial murder case, there is a reasonable probability that had trial counsel conducted an adequate investigation and called Mr. Hudson as a witness, Mr. Pippen would not have been convicted as charged. Mr. Pippen deserves the opportunity to present Hudson's testimony to a jury and properly defend himself against these charges. To allow the Court of Appeals' decision to stand in this case would be manifestly unjust. MCR 7.305(B).

Summary and Relief

WHEREFORE, for the foregoing reasons, Roderick Louis Pippen asks this Honorable Court to either grant this application for leave to appeal or grant any appropriate peremptory relief.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

/s/ Katherine L. Marcuz

BY:_____

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